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Civil Rights Litigation from the October 2007 Term

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CIVIL RIGHTS LITIGATION FROM THE OCTOBER 2007 TERM

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INTRODUCTION

This Article discusses last term's major civil rights decisions by dividing them into three categories: first, Section 1983 litigation; second, retaliation cases; and third, age discrimination cases. Overall, it was a good year for civil rights plaintiffs, especially in the employment discrimination area.

I. SECTION 1983 LITIGATION

It was an interesting term for Section 1983 litigation, especially for those who have followed Section 1983 law stemming back to the late 1960s. Starting in 1978 with *Monell v. Department of Social Services*,[1] we see a fairly large number of decisions concerning section 1983 litigation in almost every single term of the United

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[1] 436 U.S. 658 (1978).

States Supreme Court.[2] Section 1983, of course, is a vital statute; it is the vehicle for enforcing federal constitutional rights against state and local officials and municipalities.[3] The trend of a large number of Section 1983 decisions within each term will continue into the October 2008 term. However, last term was slender in Section 1983 Supreme Court decisional law.

Only one Supreme Court decision can be identified as being a hard-core Section 1983 case, *Engquist v. Oregon Department of Agriculture*.[4] This case held that public employees may not assert so-called "class of one" equal protection claims.[5] To understand the significance of this decision, go back to 2000 when the Court decided *Village of Willowbrook v. Olech*.[6] In that case, Ms. Olech asked the village for authorization to connect to the village's water supply.[7] The village agreed, but in exchange, demanded that Ms. Olech give

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[2] *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194 (2004); Bd. of County Comm'rs of Brian County v. Brown, 520 U.S. 397 (1997); Heck v. Humphrey, 512 U.S. 477 (1997); Johnson v. Jones, 515 U.S. 304 (1995); Hafer v. Melo, 502 U.S. 21 (1991); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Malley v. Briggs, 475 U.S. 335 (1986); Wilson v. Garcia, 471 U.S. 261 (1985); Block v. Rutherford, 468 U.S. 576 (1984).

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2000).

[4] 128 S. Ct. 2146 (2008).

[5] *Engquist*, 128 S. Ct. at 2148-49.

[6] 528 U.S. 562 (2000).

[7] *Olech*, 528 U.S. at 563.

the village a thirty-three foot easement on her property.[8] Ms. Olech objected, stating that other property owners in the village had only been asked to provide fifteen-foot easements.[9] She asserted an equal protection claim under Section 1983, not on the basis discrimination—like race or gender—but alleged she was arbitrarily singled-out by the village.[10]

The Supreme Court's per curiam five-paragraph opinion held that allegations made by an individual that she or he had been arbitrarily singled-out without a legitimate government interest states a "class of one" equal protection claim without regard to the motivation of the government officials.[11] When you think of the phrase "class of one," it is almost a contradiction in terms.[12] Nevertheless, the *Olech* case has come to be recognized as the decision authorizing "class of one" equal protection claims. You can just imagine what would follow.

Predictably, large numbers of Section 1983 "class of one" equal protection claims were asserted. Plaintiffs often have plausible reason to think—and grounds to assert—that the government treated them poorly, and did so by singling them out in an arbitrary fashion.[13]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 564-65.

[12] *Olech*, 528 U.S. at 564 n.* (stating that "[w]hether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis"); *see also* Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 459 n.1 (2008) (noting that "[t]raditionally, 'class of one' refers to the ability of an individual to bring forth an equal protection claim").

[13] *See* Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923) (" 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within

The lower federal courts were beside themselves trying to figure out how to decide these claims. The questions became: what is *Olech* going to lead to; where is this going to end? Traditional arbitrary and capricious judicial review claims under state law were being converted into equal protection claims. In the *Engquist* case, however, the Ninth Circuit held that public employees may not assert "class of one" equal protection claims,[14] and the United States Supreme Court affirmed.[15]

The decision from the Supreme Court is significant for two reasons. First, this decision removed public employees from the scope of "class of one" equal protection.[16] Therefore, no matter how arbitrary the government's decision might appear to be, a public employee may not assert a "class of one" claim, based on the theory that government personnel decision making is inherently highly subjective and discretionary.[17] In other words, "class of one" claims come in conflict with the way government makes personnel decisions.[18] Public employees may continue to assert equal protection claims based on class factors like race, gender, or national origin, but not "class of one" claims.[19] The *Engquist* decision is part of a broader trend of the Supreme Court narrowing constitutional protection for

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the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " (quoting Sunday Lake Iron Co. v. Wakefield Twp., 247 U.S. 350, 352 (1918))).

[14] Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007).

[15] *Engquist*, 128 S. Ct. at 2157.

[16] *Id.* at 2148-49.

[17] *Id.* at 2154.

[18] *Id.* at 2157.

[19] *Id.* at 2154.

public employees. For example, in *Garcetti v. Ceballos*,[20] the Court held that free speech retaliation claims asserted by public employees may not be based upon employee speech pursuant to the employee's governmental responsibilities.[21] Courts have been dismissing large numbers of public employee retaliation claims under *Garcetti*.[22] This is significant given the vast number of people who work for the government.[23]

The *Engquist* decision is significant for a second reason that goes beyond public employees. The Court's analysis indicates that "class of one" equal protection claims will be permitted only when the government makes a decision based upon some objective standard; for example the allegation in *Olech* that the village had invariably required only a fifteen-foot easement.[24] This is another way of saying that if the government's decision was based upon discretion or subjective factors, the plaintiff may not assert a "class of one" equal protection claim. This is probably what the lower federal courts were hoping for, some way to narrow or confine the "class of one" doctrine.

The dissent in *Engquist*, by Justice Stevens, stated the Court went too far by excluding public employees from "class of one"

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[20] 547 U.S. 410 (2006).

[21] *Id.* at 426.

[22] *See generally* Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After* Garcetti, 57 AM. U. L. REV. 1531 (2008). "[F]ederal law today includes absolutely zero protection for employees in such [retaliation claims], and . . . perhaps unintentionally, Garcetti is the reason why." *Id.* at 1534.

[23] The federal government alone employs over two million people. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION: DECEMBER 2007 (2007), http://ftp2.census.gov/govs/apes/07fedfun.pdf.

[24] *See Engquist*, 128 S. Ct. at 2153-54 (explaining the rationale of the *Olech* decision).

equal protection claims.[25] Justice Stevens used the metaphor that "the Court should [have] use[d] a scalpel rather than a meat-axe."[26] This raises an interesting point in terms of equal protection analysis. It is difficult to justify a decision by the Supreme Court stating that a certain group of individuals—in *Engquist*, public employees—are totally excluded from a particular type of equal protection claim. Consider the constitutional rights of prisoners, who overall have quite limited constitutional protections.[27] For example, prisoners have free speech rights, but those rights do not resemble the free speech rights of non-prisoners. Even prisoners, however, are not totally excluded from First Amendment protection.[28] Therefore, from the standpoint of doctrinal analysis, it is very hard to justify the *Engquist* decision.

In Justice Stevens' view, the Court should have narrowed the "class of one" doctrine, but should not have totally excluded public employees. In other words the Court should have held that public employees may assert "class of one" equal protection claims, but only under certain circumstances. The end result would likely be a highly circumscribed remedy that public employees could continue to assert, but with a generally false hope of success because the claim would not likely succeed in many cases.

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[25] *Id.* at 2161 (Stevens, J., dissenting) ("[T]here is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations . . . .").

[26] *Id.* at 2158.

[27] *See generally* Naomi Roslyn Galtz & Michael B. Mushlin, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 33 (2009) ("Through a series of sharply divided decisions over the last two decades, the Supreme Court has forcefully limited the conditions under which courts will recognize the violation of prisoner's rights.").

[28] *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 225 (2001) (holding that prisoners do not possess a specially protected First Amendment right to give legal assistance to fellow prisoners).

In the end, is it better to have the Supreme Court deny a remedy altogether, or to have a highly circumscribed remedy? By analogy, in Section 1983 law, the Supreme Court held that a plaintiff could sue a municipality by claiming inadequate training.[29] However, the standards are so excruciatingly difficult for the plaintiffs that they win these cases fairly infrequently.[30] Considering the expenditure of litigation and judicial resources, would it have been better for the Court to hold that it is not going to recognize this claim? Experience reveals that plaintiffs' lawyers may accept as truth that only one out of five hundred of a particular type of claim will succeed, but nevertheless believe that they have the one winning claim. This is not to suggest that totally excluding the remedy is the preferred solution, but only to raise the issue whether a very highly circumscribed remedy or no remedy at all is preferable.

II. RETALIATION CASES

The second category is retaliation cases. An article in the *National Law Journal* stated that out of all of the discrimination claims filed with the Equal Employment Opportunity Commission ("EEOC"), thirty percent are retaliation claims.[31] These civil rights retaliation claims are quite significant. Some federal anti-

[29] *See* City of Canton v. Harris, 489 U.S. 378, 392 (1989).

[30] *See id.* (holding a municipality liable for inadequate training can only be established "where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants"); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992) (adding the considerations of whether the plaintiff's harm was caused by the city and whether it violated plaintiff's constitutional rights).

[31] *See* Tresa Baldas, *Retaliation Claims 'Paralyze' Employers: As Claims Spike, Lawyers Shift Strategy, Urge Employers to Fight Back*, 31 NAT'L L.J. 4 (2008) (stating that by 2007, retaliation claims increased by eighteen percent to 26,663).

discrimination statutes have explicit prohibitions against retaliatory conduct, such as Title VII and the Americans With Disabilities Act ("ADA").[32] Conversely, some federal statutes prohibit discrimination, but are silent on the question of whether the statute prohibits retaliatory conduct. Two of the latter types of statutes were brought before the Supreme Court last term. The first involved Section 1981 of Title 42, which prohibits intentional racial discrimination in contracts,[33] in *CBOCS West, Inc. v. Humphries*.[34] The second is part of the Age Discrimination in Employment Act ("ADEA"), which protects federal government employees against age discrimination,[35] in *Gomez-Perez v. Potter*.[36]

Significantly, in both cases the Court interpreted the federal statutes as authorizing a cause of action for retaliation.[37] In fact, in *CBOCS West, Inc.*, the plaintiff alleged that he was fired because he complained about racial discrimination against a co-worker; he was allowed to assert a retaliation claim under Section 1981.[38] In *CBOCS West, Inc.*, the federal government's position was that Section 1981 should be interpreted to prohibit retaliation. Nevertheless, the federal

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[32] *See* 42 U.S.C.A. § 12112(a) (West 2008) ("No . . . entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[33] Section 1981 of Title 42 provides, in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (2000).

[34] 128 S. Ct. 1951 (2008).

[35] The Age Discrimination in Employment Act of 1967 provides, in pertinent part: "All personnel actions affecting employees . . . at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C.A. § 633a(a) (West 2009).

[36] 128 S. Ct. 1931 (2008).

[37] *Gomez-Perez*, 128 S. Ct. at 1935; *CBOCS*, 128 S. Ct. at 1954.

[38] *CBOCS*, 128 S. Ct. at 1954-55.

government took the position in *Gomez-Perez* that the ADEA provisions protecting federal employees from age discrimination should not be interpreted to prohibit retaliatory conduct.[39] It seemed that the federal government's position was that a retaliation claim should be recognized, except when the federal government is sued, in other words, when the defendant is the federal government.

In *CBOCS West, Inc.* there was a dialogue which was disconcerting for those who believe that a retaliation cause of action is a significant part of an anti-discrimination scheme. Justice Antonin Scalia referred to "the bad old days,"[40] referencing the days when the Court decided such cases as *Sullivan v. Little Hunting Park, Inc*,[41] in which the Court would imply a retaliation claim. Then Justice Scalia asked former Solicitor General Paul Clement, "When do you think the bad old days ended?" Without missing a beat, the Solicitor General said, "the bad old days ended when you got on the Court, Mr. Justice Scalia."[42] It was a terrific response. That dialogue was an indicator of how Justice Scalia was going to vote.

The decisions in *CBOCS West* and *Gomez-Perez* are important because they recognize that employer retaliation against an employee for asserting her or his rights under an anti-discrimination statute is, in and of itself, a form of discrimination.[43] But from the

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[39] Brief for the United States as Amicus Curiae Supporting Respondents, *CBOCS*, 128 S. Ct. 1951 (2008) (No. 06-1431), 2008 WL 63191, at *20 n.5.

[40] Transcript of Oral Argument, *CBOCS*, 128 S. Ct. 1951 (2008) (No. 06-1431), 2008 WL 446726), at *45. *See also* Joan Biskupic, *Job Discrimination Cases Hit New Opposition*, USA TODAY, Feb. 24, 2008.

[41] 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies").

[42] Transcript of Oral Argument, *supra* note 40, at *46. *See also* Biskupic, *supra* note 41.

[43] *CBOCS*, 128 S. Ct. at 1961; *Gomez-Perez*, 128 S. Ct. at 1935.

standpoint of statutory construction, it is plausible to envision these decisions having gone the other way. The Court could have reasoned that when Congress wanted to prohibit retaliation, it did so. Fortunately, the Court did not take this position.

There was a new retaliation case before the Court this October 2007 term called *Crawford v. Metropolitan Government of Nashville & Davidson County*.[44] Vicki Crawford participated in an internal investigation of a complaint of sexual harassment made by a co-worker.[45] She was not opposing gender discrimination against herself or complaining about the treatment of a co-worker.[46] According to Ms. Crawford, her "reward" for cooperating with the investigation was being fired.[47] The question is whether that sequence of events gave rise to a retaliation claim under Title VII, even though Ms. Crawford did not claim that she herself was a victim of gender discrimination?[48] The Sixth Circuit held she did not have a claim under Title VII, but the Supreme Court reversed.[49] The Court held that Title VII's prohibition against retaliation "extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation" concerning another employee.[50]

In a recent article in the *National Law Journal*, the author projected that the next wave of retaliation claims will involve plaintiffs

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[44] 129 S. Ct. 846 (2009).
[45] *Crawford*, 129 S. Ct. at 849.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 850.
[50] *Crawford*, 129 S. Ct. at 849.

alleging that because she or he made a complaint of retaliation, her or his spouse or immediate family member was fired.[51] These claims are reerred to as so-called "third party retaliation" claims.

III. AGE DISCRIMINATION CASES

The third category is age discrimination cases. During last term, five decisions dealt with the Age Discrimination in Employment Act. The most important of these cases is *Meacham v. Knolls Atomic Power Laboratory*.[52]

In 2005, in *Smith v. Jackson*,[53] the Court held that the ADEA prohibits not only disparate treatment claims, but also disparate impact claims.[54] Title VII is interpreted the same way. However, in Title VII cases, where the allegation is disparate impact, the employer has the burden of justifying the employment practice that produced the disparate impact by showing a business necessity for the practice.[55] Under the ADEA, the employer's defense is something less than business necessity, but rather, a reasonable factor other than age ("RFOA").[56]

The question in *Meacham* was who has the burden of persuasion on the issue of RFOA?[57] Does the plaintiff have to show the

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[51] Michael Starr & Christine M. Wilson, *Third-Party Retaliation*, 30 NAT'L L.J. 14 (2008).

[52] 128 S. Ct. 2395 (2008).

[53] 544 U.S. 228 (2005).

[54] *Smith*, 544 U.S. at 240.

[55] *Id.* at 243 (distinguishing "the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, [from] the reasonableness inquiry" of the ADEA).

[56] *Id.* at 238.

[57] *Meacham*, 128 S. Ct. at 2398.

employer's practice was not justified by RFOA, or is the burden on the employer to show that the practice was justified by RFOA? In a seven-to-one decision authored by Justice Souter, the Court in *Meacham* held that RFOA is an affirmative defense; therefore, the employer has the burden of producing evidence and persuading the trier of fact.[58] Justice Souter said that this ruling was significant because it will be costlier and more difficult for employers to defend against age discrimination disparate impact claims.[59] Even so, the Court's decision does not diminish the significance of the plaintiff having the burden of identifying the specific employment practice that is alleged to create the disparate impact.[60]

The second ADEA case is *Kentucky Retirement Systems v. EEOC*.[61] The issue here involved Kentucky's pension plan for policemen, fireman, and other "hazardous position" workers. The plan generally provides for benefits according to years of service.[62] The issue in the case arose out of a provision that allowed certain seriously disabled employees to retire immediately and receive "disability retirement" benefits. As discussed by the Court, the plan "treats some of those disabled individuals more generously than it treats some of those who become disabled only after becoming eligible for retirement on the basis of their age."[63] In the ADEA claim brought by the EEOC, the Court held that when a claim is brought under the

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[58] *Id.* at 2406. Justice Steven Breyer did not participate in the consideration or decision in the case.

[59] *Id.*

[60] *Id.* at 2405 (quoting *Smith*, 544 U.S. at 241).

[61] 128 S. Ct. 2361 (2008).

[62] *See, e.g., Ky. Ret. Sys.*, 128 S. Ct. at 2364.

[63] *Id.*

ADEA challenging an eligibility requirement for pension benefits, the claim fails if the court concludes that eligibility depended upon pension status.[64] Ultimately, the claim can only succeed if the plaintiff can show the employer intended to discriminate on the basis of age.[65] The bottom line is that pension plan challenges under the ADEA are not likely to be successful.

The next ADEA case is *Federal Express Corp. v. Holowecki*.[66] The question in *Holowecki* was what constitutes the filing of a "charge"—as a term of art—under the ADEA with the EEOC?[67] The ADEA provides that a civil case may not be filed unless sixty days have passed after a "charge" of discrimination has been filed with the EEOC.[68] In this case, the individual filed an intake questionnaire with the EEOC.[69] Together with the intake questionnaire was the employee's affidavit describing the alleged discrimination.[70] The Supreme Court held that the intake questionnaire and affidavit satisfied the filing of a charge with the EEOC within the meaning of the ADEA.[71]

In the case, the Court deferred to the position of the EEOC, stating that the EEOC's position that this was a charge under the statute was entitled to a measure of respect.[72] The real significance of

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[64] *Id.* at 2370. Justice Breyer wrote the opinion for the Court. Justice Kennedy dissented, joined by Justices Scalia, Ginsburg, and Alito.

[65] *Id.*

[66] 128 S. Ct. 1147 (2008).

[67] *Holowecki*, 128 S. Ct. at 1153.

[68] 29 U.S.C.A. § 626(d)(1) (West 2009).

[69] *Holowecki*, 128 S. Ct. at 1153.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1158.

this case lies in the Court's articulation that the procedural aspects of the ADEA have to be interpreted in a way that reflects the realities of the individuals who file charges with the EEOC.[73] Specifically, these individuals are, for the most part, (1) unrepresented; (2) lay individuals; (3) not highly educated; and (4) cannot be assumed to have detailed knowledge of the ADEA statutes and regulations.

The decision in *Holowecki* articulates and reflects a strikingly different attitude and philosophy than *Ledbetter v. Goodyear Tire & Rubber Co.*[74] Ms. Ledbetter alleged gender discrimination in the setting of her salary and salary adjustments.[75] The Supreme Court held that her Title VII claims of gender discrimination were untimely.[76] Ms. Ledbetter argued that she did not have a basis for knowing that her salary stemmed from gender discrimination. The Court's response was that it was obligated to strictly enforce the statutory limitation period.[77] There was, however, no concern for the plight of the employee.[78]

The last case is *Sprint/United Management Co. v. Mendelsohn*,[79] which was a highly publicized "cert. granted" case.[80] The plaintiff alleged that he had been discriminated against because of his

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[73] *Id.* (explaining that a "charge can be a form, easy to complete, or an informal document, easy to draft").

[74] 127 S. Ct. 2162 (2007).

[75] *Id.* at 2165-66.

[76] *Id.* at 2165.

[77] *Id.* at 2169.

[78] Congress subsequently overturned the decision in *Ledbetter*. *See* Robert Pear, *Congress Relaxes Rules on Suits Over Pay Inequity*, N.Y. TIMES, Jan. 28, 2009, at A14.

[79] 128 S. Ct. 1140 (2008).

[80] *See, e.g.*, Marcia Coyle, *Court Takes on 'Me, Too' Age Bias Case*, 190 N.J.L.J. 809 (2007); Linda Greenhouse, *Justices Express Skepticism in a Discrimination Case*, N.Y. TIMES, Dec. 4, 2007, at A26.

age, and that his supervisor was the one who engaged in this intentional age discrimination.[81] In cases all over the country, when a plaintiff says she or he has evidence that the same supervisor on other occasions also engaged in intentional age discrimination in employment, courts have been generally receptive in allowing the plaintiff to introduce that evidence.[82] It is "other act" evidence,[83] but it is highly probative on the question of whether the defendant intended to discriminate on the basis of age on this particular occasion. Given how difficult it is for a civil rights plaintiff to prove intentional discrimination, strong policy arguments normally favor the admissibility of this type of evidence. On the other hand, this evidence is not automatically admissible; admissibility depends on when and under what circumstances these other acts occurred.[84]

The press called the *Mendelsohn* case of the "Me, Too" evidence case.[85] There was a "twist" in the case. The issue was if the "other act" evidence was admissible even though the past discrimination was by a different supervisor then the one in the instant case.

The Court in *Mendelsohn* held that two evidentiary issues must be resolved in order to answer the question of admissibility. First, is the evidence sought to be introduced relevant? The Court

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[81] *Mendelsohn*, 128 S. Ct. at 1143.

[82] *See* MARTIN SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE (4th ed. 2007).

[83] *See* FED. R. EVID. 404(b) providing, in pertinent part:

> Evidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Id.

[84] *Mendelsohn*, 128 S. Ct. at 1147.

[85] *See* Coyle, *supra* note 80.

said that relevancy is determined, not on the basis of per se rules, but on a case-by-case basis.[86] The Court said that "whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."[87] Second, a court must determine the Rule 403 issue of whether the probative value of the evidence is substantially outweighed by the danger of the unfair prejudice to the defendant? The Court said that this issue too should be determined, not on the basis of per se rules, but on a case-by-case basis.[88] Therefore, the case was remanded to the lower court.[89]

[86] *Mendelsohn*, 128 S. Ct. at 1147.
[87] *Id.*
[88] *Id.* at 1145.
[89] *Id.* at 1147.